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## A RIGHT TO DIE, A RIGHT TO INSURANCE PAYOUTS? THE IMPLICATIONS OF PHYSICIAN-ASSISTED SUICIDE ON LIFE INSURANCE BENEFITS

Amber N. Morris\*

### I. INTRODUCTION

The debate revolving around assisted death in the United States has persisted since the early 1900s.<sup>1</sup> In 1997, Oregon was the first state in the Union to codify physician-assisted suicide (“PAS”).<sup>2</sup> Since then, eight other American jurisdictions have followed suit, and sixteen more considered PAS legislation in 2020.<sup>3</sup> As more states enact PAS laws, it is imperative that the laws include provisions that protect consumers, specifically regarding post-mortem life insurance benefits. This paper is the first to analyze PAS and its impact on life insurance, taking the stance that beneficiaries of insureds who participate in PAS should not be denied benefits under the insurance policy, regardless of contractual language to the contrary.

An individual’s right to privacy and autonomy has developed tremendously over the past half-century in American jurisprudence.<sup>4</sup> Some of these rights revolve around a patient’s freedom to make independent medical decisions regarding the patient’s care.<sup>5</sup> Patient autonomy, however, is

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1. *Chronology of Assisted Dying in the U.S.*, DEATH WITH DIGNITY, <https://perma.cc/3T7U-YWYJ> (last visited July 28, 2020).

2. OR. REV. STAT. ANN. §§ 127.800–127.987 (2020); *see also History*, DEATH WITH DIGNITY, <https://perma.cc/HRT3-YQDW> (last visited July 1, 2020) (“[The passage of Oregon’s Death with Dignity Act] made Oregon the first U.S. state and one of the first jurisdictions in the world to officially legalize medical aid in dying.”).

3. *Take Action in Your State*, DEATH WITH DIGNITY, <https://perma.cc/E598-AT23> (last visited Apr. 4, 2020). Jurisdictions that have adopted PAS laws include California, Colorado, District of Columbia, Hawaii, Maine, New Jersey, Oregon, Vermont, and Washington. *Id.*

4. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a Connecticut statute banning the sale of contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that the Equal Protection Clause of the Fourteenth Amendment extends the right to contraception to non-married individuals); *Roe v. Wade*, 410 U.S. 113 (1973) (ruling women have a constitutional right to privacy regarding abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that individuals have a constitutional right to marry each other, regardless of race); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that individuals of the same sex have a constitutional right to marry one another).

5. *See, e.g.*, *In re Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976) (holding that an individual has the right to terminate life-saving treatment); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (ruling that a woman need not obtain spousal consent prior to receiving an abortion and

not limitless and may be narrowed when strong public policy concerns point to restricting the individual rights of the patient.<sup>6</sup>

A patient's right to die,<sup>7</sup> or lack thereof, is an example of the strong public policy concerns restricting the individual rights of the patient.<sup>8</sup> The United States Supreme Court has examined the right to die and its relevance to patient autonomy and the right to privacy on several occasions; however, the Court has yet to rule that the right to die is a fundamental right.<sup>9</sup> Nonetheless, nine American jurisdictions have codified right-to-die laws in the form of PAS statutes, otherwise known as "Death with Dignity" laws.<sup>10</sup>

PAS occurs when a doctor assists a patient in committing suicide through the doctor's medical knowledge or a written prescription.<sup>11</sup> Unlike euthanasia, the doctor does not actively participate in the final act of killing the patient; rather, the patient commits suicide based on information gleaned from the doctor or through ingesting a pill from a written prescription.<sup>12</sup> Statutes legalizing PAS are modeled after Oregon's Death with Dignity Act, which was the first codified PAS statute in the United States.<sup>13</sup>

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reaffirming the holding in *Roe v. Wade*, 410 U.S. 113 (1973)); *Roe*, 410 U.S. 113 (holding that a woman has a fundamental right to privacy regarding abortion).

6. *See, e.g.*, *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990) (holding that the Constitution does not forbid states from requiring clear and convincing evidence of an incompetent's wishes regarding withdrawal of life-sustaining treatment).

7. The right to die includes three distinct types of assisted death: active euthanasia, passive euthanasia, and PAS. Katherine A. Chamberlain, *Looking for a Good Death*, 17 *ELDER L.J.* 61, 65 (2009). Active euthanasia involves a physician "'perform[ing] an affirmative act, such as injecting a lethal dose of opiates into the patient, with the intent of causing the patient's death.'" Glen R. McMurry, Comment, *An Unconstitutional Death: The Oregon Death with Dignity Act's Prohibition Against Self-Administered Lethal Injection*, 32 *DAYTON L. REV.* 441, 449 (2007). Passive euthanasia refers to a time in which a patient dies due to "a physician's inaction or omission, such as withholding life-sustaining hydration and nutrients or refusing to initiate potentially life-threatening therapies." *Id.* Lastly, PAS does not require a doctor's action or inaction; rather, "the doctor assists suicide by offering her medical knowledge but does not actively or passively participate in the actual event of death." *See* Chamberlain, *supra*, at 65. For example, the doctor may provide the means of death, such as a writing a prescription for the patient, while the patient takes the active step to ingest the prescription, thereby causing death. *Id.* The focus of this paper is PAS.

8. *Vacco v. Quill*, 521 U.S. 793 (1997) (holding that New York statutes outlawing assisted suicide do not violate the Equal Protection right of terminally-ill individuals); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that assisting in another person's suicide is not a fundamental right, and is therefore not protected by the Due Process Clause of the Fourteenth Amendment).

9. *See, e.g.*, *Vacco*, 521 U.S. 793 (1997); *Glucksberg*, 521 U.S. 702 (1997); *Gonzales v. Oregon*, 546 U.S. 243 (2006).

10. *Take Action in Your State*, *supra* note 3. These jurisdictions include California, Colorado, District of Columbia, Hawaii, New Jersey, Maine, Oregon, Vermont, and Washington. *Id.* Montana has not codified PAS, but the state's Supreme Court has held that nothing in Montana law prohibits PAS. *See* *Baxter v. State*, 224 P.3d 1211, 1221 (Mont. 2009).

11. *See generally* Chamberlain, *supra* note 7.

12. *Id.* at 65.

13. *Death with Dignity Acts*, DEATH WITH DIGNITY, <https://perma.cc/KTH3-BEAK> (last visited July 28, 2020).

Due to the success of Oregon's PAS legislation, many of the provisions in Oregon's Death with Dignity Act are included in other PAS legislation across the country.<sup>14</sup>

Although Oregon codified the first PAS statute in 1997,<sup>15</sup> states continue to debate PAS legislation across the United States.<sup>16</sup> In 2019 alone, twenty states considered PAS legislation in their respective legislatures,<sup>17</sup> and two states adopted right-to-die laws.<sup>18</sup> Because of the serious and permanent nature of PAS, right-to-die legislation requires stringent safeguards to protect patients and prevent misuse of the system.<sup>19</sup> For example, a person participating in PAS must be diagnosed with a terminal illness,<sup>20</sup> defined as "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months."<sup>21</sup> Other safeguards exist within PAS statutes that protect the patient post-mortem, such as provisions regulating insurance and annuity policies.<sup>22</sup>

These safeguards require that insurers<sup>23</sup> honor an insured's<sup>24</sup> decision to participate in PAS; thus, an insured's participation in PAS cannot affect the applicability of relevant insurance policies.<sup>25</sup> Despite these safeguards,

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14. *Id.*

15. *Oregon*, DEATH WITH DIGNITY, <https://perma.cc/GZ42-PTYZ> (last visited July 28, 2020).

16. *Take Action in Your State*, *supra* note 3.

17. *Id.* States that considered PAS legislation in 2019 were: Arizona, Arkansas, Connecticut, Delaware, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Rhode Island, Utah, and Virginia. *Id.*

18. Maine and New Jersey adopted PAS legislation during the 2019 legislative session. *See From First Bill to Final Win: A Recap of the 2019 Legislative Session*, <https://perma.cc/5PJS-X2XN> (last visited July 28, 2020).

19. Chamberlain, *supra* note 7, at 85.

20. OR. REV. STAT. § 127.805 (2020).

21. OR. REV. STAT. § 127.800 (2020).

22. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 443.13 (2020); COLO. REV. STAT. § 25-48-115 (2020); D.C. CODE § 7-661.009 (2020); HAW. REV. STAT. § 327L-17 (2019); ME. REV. STAT. 22 § 2140(19) (2019); N.J. STAT. § 26:16-14 (2019); OR. REV. STAT. § 127.875 (2020); VT. STAT. ANN. tit. 18, § 5287 (2020); WASH. REV. CODE § 70.245.170 (2020).

23. An insurer is "[s]omeone who agrees, by contract, to assume the risk of another's loss and to compensate for that loss." *Insurer*, BLACK'S LAW DICTIONARY (10th ed. 2014).

24. An insured is "[s]omeone who is covered or protected by an insurance policy." *Insured*, BLACK'S LAW DICTIONARY (10th ed. 2014). A policyholder is "[s]omeone who owns an insurance policy, regardless of whether that person is the insured party." *Policyholder*, BLACK'S LAW DICTIONARY (10th ed. 2014). Although a policyholder may be an insured under the policy, a policy may also cover a third party who is not the policyholder. *Id.*

25. CAL. HEALTH & SAFETY CODE § 443.13 (2020); COLO. REV. STAT. § 25-48-115 (2020); D.C. CODE § 7-661.009 (2020); HAW. REV. STAT. § 327L-17 (2019); ME. REV. STAT. 22 § 2140(19) (2019); N.J. STAT. § 26:16-14 (2019); OR. REV. STAT. § 127.875 (2020); VT. STAT. ANN. tit. 18, § 5287 (2020); WASH. REV. CODE § 70.245.170 (2020).

the broad statutory language in PAS legislation allows insurers to attempt to avoid coverage if an insured participates in PAS.<sup>26</sup>

This paper specifically analyzes PAS and its applicability to incontestability and suicide clauses, insurer defenses, and policyholder counter-defenses. Part II of this paper begins with a history of PAS in the United States and concludes by explaining life insurance, insurer defenses to coverage, and policyholder counter-defenses. Part III of this paper analyzes whether a life insurance policy should be held in force under three scenarios: (1) when the policyholder knew of the terminal illness before applying for life insurance and disclosed this information to the insurer, (2) when the policyholder knew of the terminal illness before applying for life insurance and did *not* disclose this information to the insurer, and (3) when the policyholder did not know about the terminal illness prior to applying for life insurance, and thus, could not disclose the information to the insurer.

Additionally, Part III of this paper argues that, unless the policyholder misrepresented information on the application for insurance, an insurer cannot contest liability under the policy. This paper further argues that PAS does not constitute “suicide” in the common sense of the word. Persons participating in PAS are not taking their own lives with an uncertain life span; rather, they have a specified, limited time to live due to illness and wish to expediate their impending death through dignified means. Thus, because insureds participating in PAS will perish in a limited time regardless of whether they participate in PAS, beneficiaries of insureds who participate in PAS should not be denied benefits under the policy, despite contractual language to the contrary under a suicide clause.

Part IV of this paper analyzes the impact of legislation when states adopt right-to-die laws and how this the legislation affects life insurance benefits post-mortem. With the rise of PAS legislation, it is imperative that states adopting these laws codify specific provisions that require insurers to honor an insured’s decision to participate in PAS, regardless of policy language to the contrary. Failure to include safeguards regulating insurers in PAS laws will lead to prejudicial treatment of insureds that participate in PAS and will unjustly strip beneficiaries of their rightful compensation under the policy.

Lastly, Part V of this paper recommends amendments to existing PAS laws, which should be incorporated in future PAS legislation. These amendments include specific and unambiguous language requiring insurers to honor an insured’s decision to participate in PAS, regardless of policy lan-

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26. See generally CHRISTOPHER C. FRENCH & ROBERT H. JERRY, *INSURANCE LAW AND PRACTICE: CASES, MATERIALS, AND EXERCISES* at 64 (2018) (“The practice of some insurers of going back to the application and attempting to find some basis for voiding a policy . . . is not an unusual practice, as insurers typically use every means at their disposal to deny claims to the extent legally permissible.”).

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guage to the contrary. The recommended amendments will further protect vulnerable consumers from prejudicial treatment post-mortem.

## II. BACKGROUND

The effect of PAS on life insurance benefits addresses two complex areas of law: constitutional rights to privacy and autonomy, and insurance regulation. Given the intricacies of these areas of law this paper first thoroughly examines the history and background of each prior to an analysis of the overlap between them.

### A. *Physician-Assisted Suicide in the United States*

The right to die has been a contested topic in American jurisprudence for over a century.<sup>27</sup> The stigma against suicide in Great Britain carried over to the American colonies and situated itself in the common law.<sup>28</sup> In 1828, New York became the first state to explicitly outlaw assisted suicide, with many states following suit.<sup>29</sup> By the time Congress ratified the Fourteenth Amendment, most states prohibited assisted suicide, reasoning that the state has a legitimate interest in preserving life.<sup>30</sup> Over the past half-century, however, United States jurisprudence began recognizing an individual's right to privacy and autonomy.<sup>31</sup>

#### 1. *The Debate*

The debate surrounding the legalization of assisted dying in the United States can be traced back to 1906.<sup>32</sup> Although nine jurisdictions have ex-

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27. Melissa Legault, Note, "*I Don't Want to Die, but I am Dying*": *Reexamining Physician-Assisted Suicide in a New Age of Substantive Due Process*, 60 ARIZ. L. REV. 509, 512 (2018) (citing *Chronology of Assisted Dying in the U.S.*, *supra* note 1). See also Chamberlain, *supra* note 7, at 63–64; Stephanie M. Richards, *Death with Dignity: The Right, Choice, and Power of Death by Physician-Assisted Suicide*, 11 CHAR. L. REV. 471, 473–74 (2017); Sean Sweeney, Note, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE W. RES. L. REV. 941, 946 (2017).

28. Chamberlain, *supra* note 7, at 63 ("Anglo-America inherited a common-law tradition from England that penalized both those who committed suicide and those who assisted suicide.").

29. *Id.* at 63.

30. *Id.*

31. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a Connecticut statute banning the sale of contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that the Equal Protection Clause of the Fourteenth Amendment extends the right to contraception to non-married individuals); *Roe v. Wade*, 410 U.S. 113 (1973) (ruling women have a constitutional right to privacy regarding abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that individuals have a constitutional right to marry each other, regardless of race); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that individuals of the same sex have a constitution right to marry one another).

32. *Chronology of Assisted Dying in the U.S.*, *supra* note 1.

pressly adopted PAS laws,<sup>33</sup> the tension between those in favor and those against PAS continues to rage on across the country.<sup>34</sup> Indeed, except for Hawaii and Washington, each time a jurisdiction has codified PAS legislation, opponents have introduced legislation or have instituted litigation to repeal the newly-adopted legislation.<sup>35</sup>

While proponents argue that there is a constitutional liberty interest in choosing to die through PAS,<sup>36</sup> opponents of legalizing PAS argue that the state's interest in protecting life outweighs this personal liberty interest.<sup>37</sup> In their arguments, proponents of PAS typically cite to inadequate palliative care in pain management and the right to choose one's means of death with dignity.<sup>38</sup> Additionally, proponents argue that refusing life-sustaining treatment, which is legal in most states,<sup>39</sup> produces the same end results as PAS—death of the terminally-ill patient. Thus, in their view, there is no substantive basis for distinguishing the legality of death by refusing life-sustaining treatment and PAS.<sup>40</sup> Conversely, opponents of PAS typically cite to the state's interest in preserving life and preventing suicide, maintaining the integrity of the medical profession, and protecting vulnerable groups.<sup>41</sup>

## 2. *Oregon and the Rise of Physician-Assisted Suicide Legislation*

Although those in opposition to PAS vehemently fought against its legalization, the right to die was first recognized as an individual right in

33. These jurisdictions include California, Colorado, District of Columbia, Hawaii, Maine, New Jersey, Oregon, Vermont, and Washington. See *Take Action in Your State*, *supra* note 3.

34. *Doctors Debate About Physician-assisted Suicide*, NEWS MEDICAL, <https://perma.cc/7H9V-Q7JG> (last visited March 28, 2020) (“Few issues in medicine have been more controversial in recent years than physician-assisted suicide.”). In 2020, sixteen states considered PAS legislation. *Take Action in Your State*, *supra* note 3.

35. See, e.g., *California*, DEATH WITH DIGNITY, <https://perma.cc/5Y9M-V3WU> (last visited July 28, 2020); *New Jersey*, DEATH WITH DIGNITY, <https://perma.cc/88MA-5LAQ> (last visited July 28, 2020); *Vermont*, DEATH WITH DIGNITY, <https://perma.cc/9PYV-XUBP> (last visited July 28, 2020).

36. Chamberlain, *supra* note 7, at 72.

37. Rachel D. Kleinberg & Toshiro M. Mochizuki, *The Final Freedom: Maintaining Autonomy and Valuing Life in Physician-Assisted Suicide Cases*, 32 HARV. C.R.-C.L. L. REV. 197, 209 (Winter 1997).

38. Cathy Lu, *The Debate Over Physician-Assisted Suicide*, 24 HUM RTS. Q. 8, 8 (Fall, 1997)

39. Elizabeth Helene Adamson, Comment, *The Right to Refuse Life Sustaining Medical Treatment and the Noncompetent Terminally Ill Patient: An Analysis of Abridgment and Anarchy*, 17 PEPP. L. REV. 461, 464 (1990).

40. Chamberlain, *supra* note 7, at 73-74.

41. *Id.* at 79. See also Bryan Hillard, *The Politics of Palliative Care and the Ethical Boundaries of Medicine: Gonzales v. Oregon as a Cautionary Tale*, 35 J.L. MED. & ETHICS 158 (2007); Melvin I. Urofsky, *Do Go Gentle into That Good Night: Thoughts on Death, Suicide, Morality and the Law*, 59 ARK. L. REV. 819 (2007); Stephen W. Smith, *Evidence for the Practical Slippery Slope in the Debate on Physician-Assisted Suicide and Euthanasia*, 13 MED. L. REV. 17 (2005); Carrie H. Paillet, Comment, *Abortion and Physician-Assisted Suicide: Is there a Constitutional Right to Both?* 8 LOY. J. PUB. INT. L. 45 (2006).

the United States in the 1990s.<sup>42</sup> In the midst of disputes in court regarding assisted dying as a fundamental right, Oregon voters passed Ballot Measure 16<sup>43</sup> in 1994, approving the adoption of PAS in the state.<sup>44</sup> After the adoption of Measure 16, there were numerous unsuccessful attempts to repeal the Act.<sup>45</sup> Thus, Oregon's Death with Dignity Act<sup>46</sup> went into effect in 1997, making Oregon the first state to legalize assisted death in the United States.<sup>47</sup>

In 1997, the United States Supreme Court heard two cases regarding the right to die—*Vacco v. Quill*<sup>48</sup> and *Washington v. Glucksberg*.<sup>49</sup> In both decisions, the Court held that an individual does not have a fundamental right to die and that the state has legitimate interests in preserving the life of individuals.<sup>50</sup> However, in both cases the Court recognized the inadequacy of current palliative care, insinuating that there may be a constitutional right to PAS, and thereby opening the door for the possibility of hearing cases regarding the issue in the future.<sup>51</sup>

Nearly ten years later, in 2006, the Court once again heard a case regarding assisted death after Oregon's Death with Dignity Act was in effect for almost a decade.<sup>52</sup> In *Gonzales v. Oregon*,<sup>53</sup> the Court held that, under the clear language of the federal Controlled Substance Act,<sup>54</sup> the Attorney General cannot prohibit physicians from prescribing drugs to facilitate PAS.<sup>55</sup> *Gonzales* was the last time the Court has heard argument regarding the right to die.<sup>56</sup>

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42. See *Chronology of Assisted Dying in the U.S.*, *supra* note 1.

43. Ballot Measure 16 reads: "Shall law allow terminally ill adult patients voluntarily informed choice to obtain physician's prescription for drugs to end life?" *Voters' Pamphlet*, OR, (Nov. 8, 1994), available at <https://perma.cc/YN5Z-XLMU>. Oregon voters approved Ballot Measure 16 by a narrow margin of fifty-one percent to forty-nine percent. *Basics on . . . Ballot Measure 51*, OR. LEGISLATIVE POLICY & RESEARCH OFFICE (Oct. 1997), available at <https://perma.cc/LQV7-VWVD>.

44. *Oregon*, *supra* note 15.

45. See, e.g., *Lee v. Harclerod*, 522 U.S. 927 (1997) (*cert. denied*); *Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997); *Lee v. Oregon*, 819 F. Supp. 1429 (D. Or. 1995); see also *Basics on . . . Ballot Measure 51*, *supra* note 43.

46. Oregon's Death with Dignity Act is codified at OR. REV. STAT. §§ 127.800-127.897 (2020).

47. *Oregon*, *supra* note 15.

48. 521 U.S. 793 (1997) (challenging New York's outlawing of PAS on Equal Protection grounds).

49. 521 U.S. 702 (1997) (challenging Washington's PAS ban on substantive due process grounds).

50. Chamberlain, *supra* note 7, at 68–69.

51. *Id.* at 72.

52. *Gonzales v. Oregon*, 546 U.S. 243 (2006).

53. *Id.*

54. 21 U.S.C. §§ 801-971 (2020).

55. *Gonzales*, 546 U.S. at 244.

56. *Chronology of Assisted Dying in the U.S.*, *supra* note 1.

Since the inception of Oregon's Death with Dignity Act, eight other states have enacted laws legalizing PAS,<sup>57</sup> the most recent of which were Maine and New Jersey in 2019.<sup>58</sup> Additionally, the Montana Supreme Court held in *Baxter v. State*<sup>59</sup> that Montana law prohibits PAS,<sup>60</sup> although the state has not codified PAS.<sup>61</sup> Since *Baxter*, Montana legislators have introduced several bills to codify or ban the practice of PAS, but none of these bills have passed.<sup>62</sup> Thus, while Montana may enact PAS legislation in the future, PAS is currently codified in only nine jurisdictions.<sup>63</sup>

Due to the success of Oregon's statute, existing state statutes legalizing PAS have mirrored Oregon's Death with Dignity Act.<sup>64</sup> Codified PAS statutes "allow mentally competent adult state residents who have a terminal illness with a confirmed prognosis of . . . [six] or fewer months to live to voluntarily request and receive a prescription medication to hasten their inevitable, imminent death."<sup>65</sup> These statutes require stringent safeguards to protect patients and prevent misuse of the system.<sup>66</sup> These safeguards include, among those listed above, that "two physicians must confirm the patient's residency, diagnosis, prognosis, mental competence, and voluntariness . . . [and] [t]wo waiting periods, the first between the oral request [for prescription], [and] the second between receiving and filling the prescription."<sup>67</sup> Other safeguards exist within PAS statutes, including those protecting consumers from denial of benefits across several lines of insurance,

57. California, Colorado, Washington, D.C., Hawaii, Maine, New Jersey, Oregon, Vermont, and Washington have enacted statutes legalizing PAS. See *Take Action in Your State*, *supra* note 3.

58. *Maine*, DEATH WITH DIGNITY, <https://perma.cc/98GX-3GGS> (last visited July 28, 2020); *New Jersey*, *supra* note 35.

59. *Baxter v. State*, 224 P.3d 1211 (Mont. 2009).

60. *Id.* at 1221 ("[A]s a generalized reflection of the legislature's views on third party involvement in suicides, there remains no indication that the statute was ever intended to apply to the very narrow set of circumstances in which a terminally ill patient *himself* seeks out a physician and asks the physician to provide him the means to end his own life.") (emphasis in original).

61. *Death with Dignity Acts*, *supra* note 13.

62. *Id.* See also *Montana*, DEATH WITH DIGNITY, <https://www.deathwithdignity.org/states/montana/> (last visited Apr. 4, 2020). Senate Bill 202 would have modeled Oregon's Death with Dignity Act, outlining requirements for individuals to participate in PAS. S.B. 202, 64th Mont. Leg., Reg. Sess. (Mont. 2015). Montana legislators considered two other Senate bills in 2011 and 2013 that would have legalized PAS. See S.B. 167, 63rd Mont. Leg., Reg. Sess. (Mont. 2011); S.B. 220, 64th Mont. Leg., Reg. Sess. (Mont. 2013). House Bill 536 and House Bill 284 would have created a law explicitly criminalizing physician aid in dying. H.B. 536, 65th Mont. Leg., Reg. Sess. (Mont. 2017); H.B. 284, 66th Mont. Leg., Reg. Sess. (Mont. 2019).

63. *Take Action in Your State*, *supra* note 3. Sixteen other states considered death with dignity statutes in 2020. *Id.* These states include Arizona, Connecticut, Florida, Georgia, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Utah, Virginia, and Wisconsin. *Id.*

64. *Death with Dignity Acts*, *supra* note 13.

65. *Id.*

66. *Id.*

67. *Id.*

including life insurance.<sup>68</sup> For example, Section 127.875 of the Oregon Revised Statutes reads:

The sale, procurement, or issuance of any life, health, or accident insurance or annuity policy or the rate charged for any policy shall not be conditioned upon or affected by the making or rescinding of a request, by a person, for medication to end his or her life in a humane and dignified manner. Neither shall a qualified patient's act of ingesting medication to end his or her life in a humane and dignified manner have an effect upon life, health, or accident insurance or annuity policy.<sup>69</sup>

In 2019 alone, twenty states considered right-to-die legislation,<sup>70</sup> two of which passed right-to-die laws.<sup>71</sup> Thus far in 2020, sixteen states are considering PAS legislation.<sup>72</sup> As more states adopt PAS laws, it is imperative that these laws model Oregon's Death with Dignity Act in order to provide similar protections for consumers across the country. These protections will ensure that consumers have fair access and treatment throughout the decision-making process revolving around PAS, regardless of their geographic location. Additionally, these protections must include provisions requiring insurers to honor insurance payouts for insureds who elect to participate in PAS. Thus, it is essential that new and existing laws, including Oregon's model Death with Dignity Act, adopt clear and explicit language indicating that an insurance policy involving an insured who participates in PAS is not effected by the insured's participation in PAS, regardless of any policy provisions to the contrary.

### B. *Life Insurance in the United States*

Life insurance is one of many lines of insurance. Historically, insurance was divided among three basic types: (1) life, (2) fire and marine, and (3) casualty.<sup>73</sup> Due to multiple line development and the prominence of health insurance, modern insurance is divided into two general lines: (1) life and health, and (2) property and casualty.<sup>74</sup> The focus of this paper is life insurance.

Tracing its roots back as far as Ancient Egypt, life insurance has become one of the most important and most purchased insurance products in

68. CAL. HEALTH & SAFETY CODE § 443.13 (2020); COLO. REV. STAT. § 25-48-115 (2020); D.C. CODE § 7-661.009 (2020); HAW. REV. STAT. § 327L-17 (2019); ME. REV. STAT. 22 § 2140(19) (2019); N.J. STAT. § 26:16-14 (2019); OR. REV. STAT. § 127.875 (2020); VT. STAT. ANN. tit. 18, § 5287 (2020); WASH. REV. CODE § 70.245.170 (2020).

69. OR. REV. STAT. § 127.875 (2020).

70. *Take Action in Your State*, *supra* note 3.

71. Maine and New Jersey passed PAS legislation during the 2019 legislative session. See *From First Bill to Final Win*, *supra* note 18.

72. *Take Action in Your State*, *supra* note 3.

73. FRENCH & JERRY, *supra* note 26, at 18.

74. *Id.* at 19.

the world.<sup>75</sup> According to the Insurance Information Institute, in 2015, global life insurance premiums exceeded \$2.5 trillion, and U.S. premiums totaled \$552 billion.<sup>76</sup> Like other lines of insurance, life insurers transfer payments from those who pay a premium to the pool of group funds.<sup>77</sup> Life insurance is different than other lines of insurance, however, in that it “is essentially a contract to make specific payments upon the death of the person whose life is insured.”<sup>78</sup>

Unlike other lines of insurance that guard against uncertain risk,<sup>79</sup> life insurance insures the loss of death, which is certain to occur.<sup>80</sup> Thus, the “risk” profile of an individual does not calculate *if* a person will die, but rather, *when* the person will die.<sup>81</sup> Although life insurers accept a risk that is certain to occur, insurers nonetheless classify individuals based on their potential risk—in this case, through actuarial formulas and data regarding the person’s calculated life span.<sup>82</sup> Risk can also be classified depending on the characteristics of the individual insureds (e.g., age, weight, and habits), thereby varying premium rates depending on how each insured is classified.<sup>83</sup> The process of creating risk profiles is often necessary for insurers due to the phenomenon of adverse selection.<sup>84</sup> Adverse selection is the concept that high-risk entities are more likely to seek out insurance.<sup>85</sup> Thus, based on these classifications, insurers can refuse to insure an individual or a business altogether. For example, if a person has a terminal illness and seeks a life insurance policy, the insurer may, and probably will, decline to sell the consumer a policy due to the high risk of loss predicated upon the person’s illness.<sup>86</sup> Alternatively, the insurer may raise the applicant’s premiums to an extraordinary amount that most people cannot afford.<sup>87</sup> The process of identifying entities most likely to suffer losses and charging them

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75. *Id.* at 723.

76. INS. INFO. INST., 2017 INSURANCE FACT BOOK 1–2 (2017).

77. FRENCH & JERRY, *supra* note 26, at 723.

78. JOHN F. DOBBYN & CHRISTOPHER C. FRENCH, INSURANCE LAW IN A NUTSHELL 8 (5th ed. 2016). *See also* STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS & JORDAN R. PLITT, 12A COUCH ON INSURANCE § 179:1 (3d ed. Dec. 2019 Update).

79. JAY M. FEINMAN, DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON’T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT 14 (2010).

80. COUCH ON INSURANCE § 102:9, *supra* note 78.

81. *Id.* at § 179:1.

82. *Id.* at § 1:39.

83. FRENCH & JERRY, *supra* note 26, at 8–9.

84. Tom Baker, *Containing the Promise of Insurance: Adverse Selection and Risk Classification*, 9 CONN. INS. L.J. 371, 376–77 (2003).

85. *Id.* at 373.

86. *See generally* FRENCH & JERRY, *supra* note 26, at 8–9; *see also* Baker, *supra* note 85, at 378.

87. *See generally* FRENCH & JERRY, *supra* note 26, at 8–9.

higher premiums, or refusing to insure them altogether, is known as reverse adverse selection.<sup>88</sup>

Another distinction between life insurance and other lines of insurance is the designation of a beneficiary to the policy.<sup>89</sup> Unlike other lines of insurance, in which the policyholder or injured third party receive benefits from the policy, life insurance policies pay out benefits to designated beneficiaries.<sup>90</sup>

A final distinction between life insurance and other lines of insurance is the characters involved in a life insurance policy.<sup>91</sup> There are four distinct entities involved in a life insurance policy: (1) the insurer, (2) the owner of the policy,<sup>92</sup> (3) the person whose life is the subject of the policy, otherwise known as the *cestui que vie*, and (4) the beneficiary or beneficiaries to whom the proceeds are paid.<sup>93</sup> The latter three entities can be represented by one person by naming the person's estate as the beneficiary of the policy, or by three separate people, each occupying a different role.<sup>94</sup>

### 1. *Incontestability Clauses*

One prominent issue that arises with contractual obligations of life insurance policies is that of incontestability clauses.<sup>95</sup> Incontestability clauses “protect an insured from a contest concerning the validity of the policy,”<sup>96</sup> thereby barring the insurance company from disputing liability after a certain time frame.<sup>97</sup> In a way, incontestability clauses act as a statute of limitations for insurers to dispute liability based on the insurance contract's

88. Christopher C. French, *The Role of the Profit Imperative in Risk Management*, 17 U. PA. J. BUS. L. 1081, 1122 n.173 (2015); Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223, 1253 (2004) (referring to reverse adverse selection as “cream-skimming”).

89. See generally FRANKLIN L. BEST, JR., 1 LIFE & HEALTH INSURANCE LAW § 11:1 (2d ed. Aug. 2019 Update).

90. See generally *id.*

91. See generally FRENCH & JERRY, *supra* note 26, at 723.

92. This person “has the power to name or change the beneficiary, the right to assign the policy (under certain conditions), the ability to cash it in for its surrender value, or use it as collateral in obtaining a loan, and the obligation to pay the premiums.” *Id.* at 723.

93. *Id.*

94. *Id.* See also BEST, JR., *supra* note 89, at § 2:11.

95. See generally FRENCH & JERRY, *supra* note 26, at 735–43.

96. 44 AM. JUR. 2D INSURANCE § 749 (2018). See, e.g., *Powell v. Mutual Life Ins. Co. of New York*, 144 N.E. 825 (Ill. 1924); *Simpson v. Phoenix Mut. Life Ins. Co.*, 247 N.E.2d 655 (N.Y. 1969); *Minnesota Mututal Life Ins. Co. v. Morse*, 487 S.W.2d 317 (Tex. 1972). See also Cristina Alonso, *Imposter Fraud and Incontestability Clauses in Life Insurance Policies*, 80 FLA. B.J. 68, 68 (2006).

97. Katherine Cooper, *Liar's Poker: The Effect of Incontestability Clauses After Paul Revere Life Insurance Co. v. Haas*, 1 CONN. INS. L.J. 225, 227 (1995).

validity.<sup>98</sup> Most states statutorily require incontestability clauses for the purpose of protecting consumers.<sup>99</sup> These clauses arose from insurers denying coverage based on a misstatement by the policyholder made during the application process.<sup>100</sup> With knowledge of a misstatement in the application, insurers stealthily refrained from mentioning the misstatement until an insured passed away and was therefore no longer able to dispute the misstatement.<sup>101</sup> The practice of failing to contest a misstatement in an application for insurance in a timely manner left beneficiaries in a vulnerable position in which they were forced to battle the powerful insurance companies for payment of benefits.<sup>102</sup>

An incontestability clause typically states that a policy cannot be contested, except for nonpayment of premiums, after a specific time frame,<sup>103</sup> depending on the statutory scheme and/or the insurer's choice of language.<sup>104</sup> Indeed, the standard text of an incontestability clause reads: "This policy shall be incontestable after it has been in force during the lifetime of the insured, for a period of two years from the issue date, except for nonpayment of premiums."<sup>105</sup> An incontestability clause, however, does not bar contestability completely—an insurer is free to launch an investigation and/or contest liability under the contract within the contestable period.<sup>106</sup> Further, if the *cestui que vie* dies *within* the contestable period, the insurer may contest the validity of the contract beyond the contestable period.<sup>107</sup>

With regard to fraud and misrepresentation, many courts have held that an insurer's defense of fraud is subject to the incontestability clause, i.e.,

98. See *id.*; Erin Wessling, *Contracts—Applying the Plain Language to Incontestability Clauses* Kersten v. Minnesota Mutual Life Insurance Co., 607 N.W.2D 869 (Minn. 2000), 27 WM. MITCHELL L. REV., 1253, 1255 (2000).

99. 44 AM. JUR. 2D *Insurance* § 749 (2018). See, e.g., *New England Mut. Life Ins. Co. v. Doe*, 710 N.E.2d 1060, 1062 (N.Y. 1999) (holding that one purpose of incontestability clauses is to protect consumers).

100. 16 WILLISTON ON CONTRACTS § 49:94 (4th ed. 2018) (Insurers "resisted liability stubbornly on the basis of some misstatement made by the insured at the time of applying for the policy."). See also Wessling, *supra* note 98, at 1256. ("[T]he insured commonly paid premiums for a long period of time and the insurance company would later void the contract for a minor reason when the payment of benefits was due.").

101. 16 WILLISTON ON CONTRACTS § 49:94 (4th ed. 2018) ("[Insurers] carefully refrained from comment until the insured had died and was unable to testify in his or her own behalf."). This practice is otherwise known as "post-claim underwriting" and is not unusual because "insurers typically use every means at their disposal to deny claims to the extent legally permissible." See FRENCH & JERRY, *supra* note 26, at 64.

102. 16 WILLISTON ON CONTRACTS § 49:94 (4th ed. 2018). See, e.g., *Wischmeyer v. Paul Revere Life Ins. Co.*, 725 F. Supp. 995, 1000 (S.D. Ind. 1989).

103. The incontestability time frame usually occurs after twelve or twenty-four months from the issue date of the policy. 16 WILLISTON ON CONTRACTS § 49:94 (4th ed. 2018).

104. *Id.* See also FRENCH & JERRY, *supra* note 26, at 741.

105. FRENCH & JERRY, *supra* note 26, at 741.

106. 16 WILLISTON ON CONTRACTS § 49:94 (4th ed. 2018).

107. FRENCH & JERRY, *supra* note 26, at 741.

the insurer may not contest liability under the defense of fraud if the contestability period has lapsed.<sup>108</sup> Some insurance policies even include a fraud exception within the incontestability clause, allowing the insurer to contest liability for fraud even after the contestable period has lapsed.<sup>109</sup> Nonetheless, courts are split as to whether an explicit fraud exception in the policy should be enforced.<sup>110</sup> There are typically only two exceptions that universally apply to incontestability clauses in which insurers may contest the contract even after the contestable period has passed.<sup>111</sup> These exceptions include (1) nonpayment of premiums, and (2) breach of warranty relating to military or naval service in time of war.<sup>112</sup>

## 2. *Suicide Clauses*

Like incontestability clauses, some insurers include suicide clauses within their life insurance policies.<sup>113</sup> Suicide clauses generally exclude coverage for death by suicide<sup>114</sup> and insurers generally return the monthly payments made toward the policy's premium, at least for suicides that occur within the contestable period.<sup>115</sup> Suicide clauses act as a deterrent for insureds who purchase life insurance with the intent to harm themselves.<sup>116</sup> An issue arises when a life insurance policy includes both a suicide clause *and* an incontestability clause.<sup>117</sup> Most courts hold that, if the suicide occurs within the contestable period, the suicide clause is simply a risk that is not

108. *Id.* at 742. *See, e.g.,* Bankers Sec. Life Ins. Soc'y v. Kane, 885 F.2d 820 (11th Cir. 1989) (applying Florida law); Perry v. Bankers Life and Cas. Co., 362 S.W.2d 213–14 (Tex. Ct. Civ. App. 1962); Paul Revere Life Ins. Co. v. Fima, 105 F.3d 490, 492 (9th Cir. 1997) (applying California law to an incontestability clause in the context of a disability policy).

109. FRENCH & JERRY, *supra* note 26, at 742.

110. *Id. Compare* Protective Life Ins. Co. v. Sullivan, 682 N.E.2d 624, 627 (Mass. 1997) (holding that a fraud exception within the policy was not binding and the Massachusetts incontestability statute prohibited an insurer from enforcing a fraud exception within the policy), *with* New England Mut. Life Ins. Co. v. Doe, 710 N.E.2d 1060, 1063 (N.Y. 1999) (ruling that an insurer may include a provision in its contestability clause creating an exception for “fraudulent misstatements”).

111. DOBBYN & FRENCH, *supra* note 78, at 335.

112. *Id.* at 335.

113. *See generally* Ferdinand S. Tinio, Annotation, *Suicide clause of life or accident insurance as affected by incontestable clause*, 37 A.L.R. 3d 337 (1971).

114. *Id.* (Suicide clauses “exclude as a risk insured against under the policy the death of the insured by his own hand, or provide that the policy becomes void if the insured commits suicide”). *See also* Kelly S. Noble, *Accidental Death . . . Or Was It? The Question of Suicide in Life and Accidental Death Insurance*, 39 A.B.A. BRIEF 50, 51 (2010).

115. DOBBYN & FRENCH, *supra* note 78, at 208.

116. Noble, *supra* note 115, at 51. (“The suicide exclusion is intended to protect the insurance company against adverse selection by preventing people who are contemplating suicide from first securing life insurance to protect their surviving beneficiaries.”).

117. *See generally* Tinio, *supra* note 114. *See also* *Effect of Incontestability Clause Upon Provision for Limited Liability in Case of Suicide*, Comment, 39 YALE L.J. 1050, 1052–53 (1930); *Suicide and Insurance*, 49 HARV. L. REV. 304, 304–05 (1935).

covered under the policy.<sup>118</sup> Thus, by denying coverage for suicide, the insurer is not “contesting” the validity of the contract, but rather, reading the suicide clause as a *stipulation* in the contract.<sup>119</sup>

The interpretation of the language in the insurance contract is strained when a suicide occurs *after* the contestability period has lapsed.<sup>120</sup> Some courts hold the same viewpoint in this scenario as when the suicide occurs within the contestable period—i.e., the suicide clause is an *exclusion* from the policy and the insurer is not challenging the *validity* of the contract, but rather, is enforcing the *terms* of the contract.<sup>121</sup> Still, courts are split on this issue, and some have held that the incontestability clause does not exclude suicide from its terms.<sup>122</sup> In jurisdictions that do not exclude suicide from the contractual terms, the insurer is forbidden from denying payment for a suicide occurring after the contestability period.<sup>123</sup>

### 3. *Insurer Defenses*

In addition to the limitations of coverage expressed in the policy, insurers may void insurance contracts by asserting the defenses of concealment or misrepresentation.<sup>124</sup> Both of these defenses are grounded in common law principles of contract law.<sup>125</sup>

Concealment occurs when an insured intentionally fails to disclose “material information.”<sup>126</sup> Material information includes any information specifically inquired about on an application for insurance.<sup>127</sup> When an insurer asks a question of the applicant, the information is presumed to be material in determining the applicant’s risk profile.<sup>128</sup> Material information also includes any statements made by the applicant prior to the insurer issu-

118. Tinio, *supra* note 114, at § 3. *See, e.g.*, Franklin Life Ins. Co. v. Bieniek, 312 F.2d 365 (3d Cir. 1962) (applying Pennsylvania law); Nat’l Producers Life Ins. Co. v. Rogers, 442 P.2d 876, 877–78 (Ariz. Ct. App. 1968); Nabor v. Occidental Life Ins. Co., 396 N.E.2d 1267, 1272 (Ill. App. Ct. 1979).

119. Tinio, *supra* note 114, at § 3; *see also* *Suicide and Insurance*, *supra* note 118.

120. Tinio, *supra* note 114, at § 2[a].

121. *Id.* *See, e.g.*, North Am. Union v. Trenner, 138 Ill. App. 586 (1908); Starck v. Union Cent. Life Ins. Co., 19 A. 703 (Pa. 1890); Hall v. Mututal Reserve Fund Life Ass’n, 19 Pa. Super. 31 (1902); Childress v. Fraternal Union of Am., 82 S.W. 832 (Tenn. 1904).

122. Tinio, *supra* note 114, at § 2[a]. *See, e.g.*, Seymour v. Mut. Protective League, 155 Ill. App. 21, 23–27 (1910); Mareck v. Mututal Reserve Fund Life Ass’n, 64 N.W. 68 (Minn. 1895).

123. Tinio, *supra* note 114, at § 2[a].

124. *See generally* DOBBYN & FRENCH, *supra* note 78, at 311–27.

125. Joseph K. Powers, *Pulling the Plug on Fidelity, Crime, and All Risk Coverage: The Availability of Rescission as a Remedy or Defense*, 32 TORT & INS. L.J. 905, 905–06. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 164(l) (1981).

126. DOBBYN & FRENCH, *supra* note 78, at 316.

127. Powers, *supra* note 126, at 918–19.

128. DOBBYN & FRENCH, *supra* note 78, at 314–15, 318 (“[W]hen the insurer specifically asks about something on the application or in person, it is presumed that the information is material to the insurer’s decision, despite any lack of objective relevance to the risk.”).

ing the policy.<sup>129</sup> In the United States, a policyholder does not have a duty to disclose any information that is not specifically inquired about by the insurer.<sup>130</sup> In other words, an insurer must assess the risk independently and cannot fault a policyholder for failing to disclose important information for which the insurer fails to inquire.<sup>131</sup> For example, to confirm the answers in an application for insurance, a life insurer may require a potential insured to submit to an independent medical examination (“IME”) performed by a physician of the insurer’s choosing to determine any health concerns prior to drafting an insurance policy.<sup>132</sup> If the IME reveals any health defects, the insurer will likely raise premiums for that policyholder, or will refuse to insure the person altogether under the principle of reverse adverse selection.<sup>133</sup>

Some applications for insurance contain provisions requiring the policyholder to “represent that it has disclosed all material information.”<sup>134</sup> Despite the language in these provisions, courts have generally held that the policyholder need not disclose information in good faith, but rather, must not disclose information in *bad faith*.<sup>135</sup> Further, to void a policy, the insurer must prove that it was misled by the concealment.<sup>136</sup>

Although the requirements vary between states, similar to concealment, a misrepresentation generally occurs when a representation<sup>137</sup> by the policyholder is: (1) material, and (2) false or misleading.<sup>138</sup> In determining materiality, the majority of courts look to whether the information provided would generally influence the decision of the reasonable insurer to issue a policy from the beginning or at that specific premium rate.<sup>139</sup> To void an insurance contract, the insurer must also have reasonably relied upon the

129. Powers, *supra* note 126, at 918–19.

130. *Id.* at 918. Note: This does not apply to marine insurance in the United States. See DOBBYN & FRENCH, *supra* note 78, at 315.

131. DOBBYN & FRENCH, *supra* note 78, at 313. (“[U]nder American law, it is not the policyholder’s duty. To figure out what information the insurer would find material to the risk and then to disclose such information.”).

132. *Id.* at 312.

133. See generally FRENCH & JERRY, *supra* note 26, at 8–9. See also Baker, *supra* note 85, at 378.

134. DOBBYN & FRENCH, *supra* note 78, at 314.

135. *Id.*

136. *Id.* at 315. The test to determine whether the insurer was misled is “whether the reasonable insurer would be misled.” *Id.*

137. A representation is “any statement, oral or written, express or implied, made by the policyholder to the insurer which forms at least part of the basis on which the insurer decides to enter into the contract of insurance. A representation does not become a term of the contract unless it is expressly incorporated into the written document.” *Id.* at 316.

138. FRENCH & JERRY, *supra* note 26, at 45 (State statutes govern misrepresentations to insurance companies). See, e.g., UTAH CODE § 31A-21-105 (2020); N.Y. INSURANCE LAW § 3105 (McKinney, 2019); 40 P.S. STAT. § 757 (1921).

139. Powers, *supra* note 126, at 914–15. For example, “prior medical history of an applicant is generally material to an insurer’s decision to issue a life insurance policy.” *Id.* at 914.

misrepresentation in determining whether to insure the individual or at what specific premium with which to charge the individual.<sup>140</sup>

The insurer must assert a defense as soon as practical, otherwise the defense is waived.<sup>141</sup> Some states statutorily provide a number of days in which the insurer must raise the defense after the misrepresentation is discovered to avoid waiver.<sup>142</sup> Although, most states apply a reasonableness test to determine whether the insurer acted in a “*reasonable* period of time after the insurer be[came] aware of the misrepresentation.”<sup>143</sup> Additionally, an insured is under no obligation to correct a representation that becomes untrue *after* the contract was formed.<sup>144</sup>

In addition to the defenses of concealment and misrepresentation, insurers may also rely on the fortuity doctrine to avoid coverage.<sup>145</sup> The fortuity doctrine is rooted in preventing fraud and is a central pillar of insurance contracts, governing the principle that insurance will not cover known losses.<sup>146</sup> One legal scholar puts it simply: “[I]nsurance is intended to cover *risks*, not *certainities*.”<sup>147</sup> Although insurance contracts typically do not include fortuity language, courts have held that the doctrine is implied to preclude coverage for non-fortuitous losses.<sup>148</sup> Thus, if an insured knows, or should know, of a loss at the time the policy is purchased, the fortuity doctrine will likely preclude coverage of any claim under that policy for the loss.<sup>149</sup>

140. *Id.* at 914–15. Courts use an objective test to analyze what the “reasonable insurer” would have relied upon in the particular scenario. *Id.* at 917.

141. DOBBYN & FRENCH, *supra* note 78, at 318. For example, if the insurer does not contest the validity of the policy within the contestable period, it has waived the right to do so once the contestable period has lapsed. BEST, JR., *supra* note 89, at § 6:1 (2d ed. Aug. 2018). For a discussion on waiver, see *infra* Part II.B.2.d.

142. DOBBYN & FRENCH, *supra* note 78, at 320.

143. *Id.* at 319 (emphasis in original).

144. *Id.* at 321.

145. FRENCH & JERRY, *supra* note 26, at 270.

146. COUCH ON INSURANCE § 102:9, *supra* note 78 (“The fortuity doctrine incorporates the ‘known loss’ and ‘loss in progress’ principles, which focus on the proposition that insurance coverage is precluded when the insured is, or should be, aware of an ongoing progressive loss or known loss at the time the policy is purchased.”). See also Andrew C. Whitaker, *Rescission of Life Insurance Policies in Texas – Time to Correct Some Old Errors*, 59 BAYLOR L. REV. 139, 164 (2007).

147. Matt W. Holey, *The “Fortuity Doctrine”: Misapplying the Known Loss Rule to Liability Insurance Policies*, 41 TEX. TECH L. REV. 529, 530 (2009) (emphasis added).

148. FRENCH & JERRY, *supra* note 26, at 270. Additionally, some states, such as California, have codified the fortuity doctrine. *Id.*

149. COUCH ON INSURANCE § 102:9, *supra* note 78.

#### 4. Policyholder Counter-Defenses

In response to an insurer's attempt to void the policy, the policyholder may assert two common counter-defenses: waiver and estoppel.<sup>150</sup> Although both defenses may be asserted to determine whether coverage under the written policy applies, neither defense can be asserted to "expand coverage not otherwise provided in an insurance contract."<sup>151</sup> The two defenses are often commonly interchanged synonymously, but they are in fact two separate principles of law.<sup>152</sup> Waiver is based on contract provisions, whether express or implied, whereas estoppel is an equitable remedy grounded in tort law.<sup>153</sup>

Waiver is defined as "an intentional or voluntary relinquishment of a known right."<sup>154</sup> This defense typically arises when an insurer is aware of its ability to rescind a policy, but through the words or acts of the insurer's agents, *voluntarily* surrenders that right.<sup>155</sup> Because the relinquishment of a right must be voluntary, a waiver defense will only prevail if: (1) the insurer had actual knowledge of the grounds for rescission of the policy, or (2) the insurer had knowledge of facts that would lead a reasonable insurer to make a reasonable inquiry as to the ground for rescission of the policy.<sup>156</sup>

Estoppel, on the other hand, is defined as express or implicit representation or conduct by the insurer that reasonably leads the policyholder to believe that coverage is provided under a policy, resulting in the policyholder's detrimental reliance based upon the insurer's representation or conduct.<sup>157</sup> The key element in this type of defense is the policyholder's detrimental reliance on the insurer's representation or conduct, resulting in a "prejudicial change of position because of his reliance."<sup>158</sup> Because estoppel is an equitable doctrine, the policyholder must be unaware of the true facts of the misrepresentation at the time the representation is made.<sup>159</sup> This

150. BEST, JR., *supra* note 89, at § 6:14.

151. FRENCH & JERRY, *supra* note 26, at 73. *See, e.g.*, *Shepard v. Keystone Ins. Co.*, 743 F. Supp. 429, 433 (D. Md 1990) (applying Maryland law and ruling that "waiver and estoppel cannot be used to create liability where none previously existed, or to extend coverage beyond what was originally intended"); *Martin v. U.S. Fid. And Guar. Co.*, 996 S.W.2d 506, 511 (Mo. 1999) (holding that estoppel cannot create coverage that does not already exist in the insurance contract); *Laidlaw v. Envtl. Services (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 524 S.E. 2d 847, 852 (S.C. App. 1999) (holding that waiver cannot create coverage that does not already exist within the insurance contract).

152. BEST, JR., *supra* note 89, at § 6:1.

153. *Id.*

154. *Id.*

155. DOBBYN & FRENCH, *supra* note 78, at 352.

156. *Id.* at 353.

157. *Id.* at 361.

158. *Id.* at 361–62.

159. *Id.* at 362. *See also* BEST, JR., *supra* note 89, at § 6:1. This concept is otherwise known as the "clean hands" doctrine. DOBBYN & FRENCH, *supra* note 78, at 362.

paper analyzes the interplay of common defenses and counter-defenses regarding the applicability of suicide clauses when an insured participates in PAS.

### III. THREE SCENARIOS CONSIDERING WHETHER BENEFICIARIES OF LIFE INSURANCE POLICIES IN WHICH THE INSURED PARTICIPATES IN PAS SHOULD BE DENIED BENEFITS UNDER THE POLICY

Thus far, nine jurisdictions have codified right-to-die laws.<sup>160</sup> Of the nine jurisdictions have codified right-to-die laws, all of them have adopted specific language requiring insurance companies to honor an insured's choice to participate in PAS.<sup>161</sup> This part of the paper analyzes the regulatory laws of PAS with regard to insurance and annuity policies in three different scenarios.

#### A. *Scenario 1: The Policyholder Knew of the Terminal Illness Before Applying for Life Insurance and Disclosed this Information to the Insurer.*

Before issuing an insurance policy to an individual, insurers have the right to require the policyholder to complete an application for insurance.<sup>162</sup> In the life insurance context, an insurer may even request that the insured submit to an IME by a doctor of the insurer's choice.<sup>163</sup> A typical IME for life insurance purposes consists of a blood and urine sample; height, weight, pulse, and blood pressure check; and a series of health questions to confirm that the information on the insurance application is accurate.<sup>164</sup> For more senior applicants, the physical may also consist of an electrocardiogram to test for abnormalities in the applicant's heart.<sup>165</sup>

The purpose of this process is to "protect the primary interests of the insurer."<sup>166</sup> To that end, a typical life insurance application form will ask

160. See *Take Action in Your State*, *supra* note 3.

161. CAL. HEALTH & SAFETY CODE § 443.13 (2020); COLO. REV. STAT. § 25-48-115 (2020); D.C. CODE § 7-661.09 (2020); HAW. REV. STAT. § 327L-17 (2019); ME. REV. STAT. 22 § 2140(19) (2019); N.J. STAT. § 26:16-14 (2019); OR. REV. STAT. § 127.875 (2020); VT. STAT. ANN. tit. 18, § 5287 (2020); WASH. REV. CODE § 70.245.170 (2020).

162. FRENCH & JERRY, *supra* note 26, at 40 ("To deal with [the] lack of information [on the insured], an insurer seeks information regarding the policyholder through the insurance application process.")

163. DOBBYN & FRENCH, *supra* note 78, at 312 ("[I]n the case of life insurance, the insurer can require the insured submit to an examination by the insurer's physician.")

164. *What Do Insurers Look for in a Life Insurance Blood Test and Medical Exam?*, VALUEPENGUIN, <https://perma.cc/FQ56-S34Y> (last visited Feb. 10, 2020).

165. *Id.*

166. DOBBYN & FRENCH, *supra* note 78, at 311. See also Paul R. Koepff, 3 *Law and Practice of Insurance Coverage Litigation* 37:2 (July 2018). These interests include: "(1) clearly determining all pertinent aspects of the risk for purposes of deciding whether to issue the policy and at what premium,

the applicant to answer a series of questions regarding any known diseases or illnesses.<sup>167</sup> These questions may include information regarding diseases of the brain or nervous system, heart disease, respiratory disease, gastrointestinal diseases, sexually transmitted diseases, and cancerous diseases, among others.<sup>168</sup> Assuming the applicant truthfully discloses the knowledge of a terminal disease, the insurer would likely participate in reverse adverse selection to refuse to sell insurance to the individual. In this case, the applicant has no claim against the insurance company because the insurance company is able to refuse to sell insurance to high-risk individuals if it so chooses.

Conversely, an issue may arise if the insurance company decides to insure the terminally-ill individual, although this situation is highly unlikely because the insurer will almost certainly decline to sell life insurance to someone with a terminal illness. Because PAS laws deem an individual with less than six months to live as terminally ill,<sup>169</sup> an insured participating in PAS will logically commit suicide within the contestable period of the insurance contract.<sup>170</sup> If this situation occurs, then the insurer may contest the validity of the contract in an attempt to avoid payouts to the beneficiaries of the policy.<sup>171</sup> The insurer may also attempt to void the policy under the fortuity doctrine.<sup>172</sup>

To defend such a suit, the policyholder could rely upon two counter-defenses: waiver and estoppel.<sup>173</sup> The policyholder can assert a waiver defense by arguing that because the insurer knew of the existing illness based on the policyholder's responses to the insurance application and results of any IME, and because the insurer nonetheless voluntarily accepted the risk, the insurer does not have a claim for voiding the policy.<sup>174</sup> The policyholder can argue that the insurer knowingly and voluntarily relinquished its

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and (2) being able to contain the risk within the intended bounds once the policy has been issued." DOBBYN & FRENCH, *supra* note 78, at 311.

167. *Individual Life Insurance Application Standards*, INTERSTATE INS. PROD. REGULATION COMM'N (Oct. 29, 2008), <https://perma.cc/PL3W-FM67>; *see also Individual Life Insurance Application*, NAT'L ASS'N OF ACCREDITED INS. PROF'LS, <https://perma.cc/65DM-H3D3> (last visited Feb. 10, 2020).

168. *Id.*; *see also Individual Life Insurance Application Standards*, *supra* note 167.

169. OR. REV. STAT. § 127.800 (2020) (defining "terminal disease").

170. The contestable period is typically within two years of the effective date of the policy. *See* 16 WILLISTON ON CONTRACTS § 49:94 (4th ed. 2018).

171. FRENCH & JERRY, *supra* note 26, at 64 ("[I]nsurers typically use every means at their disposal to deny claims to the extent legally permissible.").

172. DOBBYN & FRENCH, *supra* note 78, at 312 ("[I]n the case of life insurance, the insurer can require the insured submit to an examination by the insurer's physician.").

173. *What Do Insurers Look for in a Life Insurance Blood Test and Medical Exam?*, *supra* note 164.

174. *Id.*

right to refuse insuring the individual by offering a policy for coverage despite the known risks.<sup>175</sup>

Similarly, the policyholder may assert an estoppel counter-defense. The policyholder can argue that, through the insurer issuing a policy despite the known risks, the policyholder detrimentally relied upon the insurer's conduct by paying premiums and not shopping for other insurance. Under this approach, the policyholder can argue that the insurer is estopped from voiding the policy.

Under a traditional application of the fortuity doctrine, however, both of these counter-defenses could fail. Although death is certain to occur when purchasing a life insurance policy,<sup>176</sup> the fortuity doctrine nonetheless applies to prevent fraudulent purchases of life insurance.<sup>177</sup> In the proposed scenario, because the insured was aware of the terminal illness at the time of purchasing the life insurance, and purchased the insurance knowing the terminal illness would cause the insured to perish within six months,<sup>178</sup> the insurer arguably could deny coverage to the insured's beneficiaries based on an implied exclusion under the fortuity doctrine.<sup>179</sup>

Although the fortuity doctrine could allow the insurer to disclaim coverage, coverage should nonetheless apply when an insured participates in PAS under this scenario, regardless of policy language to the contrary. PAS is an atypical suicide for a myriad of reasons. Merriam-Webster defines "suicide" as "the act or instance of taking one's own life voluntarily and intentionally."<sup>180</sup> Although *physician-assisted* suicide involves the taking of one's own life voluntarily and intentionally, it also includes two important caveats that distinguish it from that of a suicide in the common vernacular: (1) PAS is expressly legal in jurisdictions that have enacted right-to-die laws;<sup>181</sup> and (2) these jurisdictions require the individual be terminally ill, defined as having six months or less to live,<sup>182</sup> to participate in PAS.<sup>183</sup>

175. DOBBYN & FRENCH, *supra* note 78, at 311. *See also* Koepff, *supra* note 166, at 37:2 (July 2018). These interests include: "(1) clearly determining all pertinent aspects of the risk for purposes of deciding whether to issue the policy and at what premium, and (2) being able to contain the risk within the intended bounds once the policy has been issued." DOBBYN & FRENCH, *supra* note 78, at 311.

176. COUCH ON INSURANCE, *supra* note 78, at § 179:1.

177. Whitaker, *supra* note 146, at 164–65.

178. OR. REV. STAT. § 127.800 (2020) (defining "terminal disease").

179. Whitaker, *supra* note 146, at 164–65 ("Although an insured's death is undoubtedly a certainty, his fraudulent nondisclosure of a serious health condition that is in the process of shortening his life runs afoul of the doctrine of fortuity and justified the rescission of his life insurance coverage.").

180. *Suicide*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2016).

181. These jurisdictions include California, Colorado, Washington, D.C., Hawaii, Maine, New Jersey, Oregon, Vermont, and Washington. *See Take Action in Your State*, *supra* note 3.

182. CAL. HEALTH & SAFETY CODE § 443.1 (2020); COLO. REV. STAT. § 25-48-102 (2020); D.C. CODE § 7-661.01 (2020); HAW. REV. STAT. § 327L-1 (2019); ME. REV. STAT. 22 § 2140(2)(M) (2019); N.J. STAT. § 26:16-3 (2019); OR. REV. STAT. § 127.800 (2020); VT. STAT. ANN. tit. 18, § 5281 (2020); WASH. REV. CODE § 70.245.010 (2020).

Additionally, insureds participating in PAS differ significantly from other individuals who choose to end their own lives—a person participating in PAS has a set amount of time to live,<sup>184</sup> whereas the life span of other insureds committing suicide is unknown.<sup>185</sup> Because a terminally ill insured will perish within a limited time regardless of whether they participate in PAS, beneficiaries of the insured's life insurance policy should receive the benefits of the policy, regardless of contractual language to the contrary. By ruling otherwise, allowing suicide clauses to control whether beneficiaries of an insured participating in PAS receive their rightful benefits, courts would allow insurers to discriminate against those individuals who are terminally ill, thereby frustrating the purpose of right-to-die laws.

The purpose of the right-to-die laws is for terminally-ill individuals to choose their manner of death in a dignified, controlled manner; the purpose is not meant to defraud insurance companies.<sup>186</sup> Thus, the insurance policy's beneficiaries should not be punished for expedition of the insured's impending death through PAS, just as beneficiaries should not be punished for an insured's natural death. Whether the insured participates in PAS in order to die in a swift, dignified manner, or the insured perishes through the drawn-out, painful manner of a natural death, the insurer will nonetheless owe the insured's beneficiaries payment within six months. Therefore, because of the distinction between a "typical" suicide and PAS, and in conjunction with the legislative intent of right-to-die laws, suicide clauses should not apply to an insured who participates in PAS, despite policy language to the contrary.

*B. Scenario 2: The Policyholder Knew of the Terminal Illness Before Applying for Life Insurance and Failed to Disclose this Information to the Insurer.*

As discussed in the previous scenario, an insurer has a right to require a potential policyholder to complete an insurance application form, and in the context of life insurance, submit a potential insured to an IME by a

183. CAL. HEALTH & SAFETY CODE § 443.2 (2020); COLO. REV. STAT. § 25-48-103 (2020); D.C. CODE § 7-661.03 (2020); HAW. REV. STAT. § 327L-2 (2019); ME. REV. STAT. 22 § 2140 (2019); N.J. STAT. § 26:16-2 (2019); OR. REV. STAT. § 127.805 (2020); VT. STAT. ANN. tit. 18, § 5283 (2020); WASH. REV. CODE § 70.245.020 (2020).

184. A terminally-ill patient participating in PAS must be diagnosed with a terminal illness that will result in death in six months or less. *See* OR. REV. STAT. § 127.800 (2020) (defining "terminal disease").

185. The concept that, although an insured's life span can be estimated, but remains unknown, is a central canon of risk profiling in the life insurance context. *See supra* Part II.B.

186. *Death with Dignity Acts*, *supra* note 13 ("[T]he basic idea . . . [is that] the terminally ill people . . . should make their end-of-life decisions and determine how much pain and suffering they should endure . . . [b]y adding a voluntary option to the continuum of end-of-life care, these laws give patients dignity, control, and peace of mind during their final days with family and loved ones.").

physician of the insurer's choice. The physician will likely not submit the potential insured to extensive tests during the IME;<sup>187</sup> thus, it is unlikely that a physician will detect a terminal disease during the IME unless the terminally-ill individual notifies the physician of the illness.<sup>188</sup> Therefore, the insurer will primarily rely on the information provided on the insurance application when determining whether to provide coverage for the individual.<sup>189</sup> If a policyholder falsifies information about the insured having a terminal disease on an insurance application, or if the policyholder completely omits the information, the application will be skewed, and the insurer's acceptance of the risk will be misinformed. In this situation, the insurer can, and likely will, contest the validity of the insurance policy under the defenses of concealment or misrepresentation.

Under the concealment defense, the insurer can argue that the policyholder withheld a material fact in bad faith by omitting information that was specifically asked about on the application for insurance. Because the insurer specifically included questions regarding the insured's health and wellness, the information is presumed to be material to the insurer's decision in issuing an insurance policy to the policyholder. This defense is limited based on the facts of the case.<sup>190</sup> For example, if the policyholder simply missed a question on the policy, the policy is incomplete on its face, and it is therefore obvious that the insurer should not rely on the application before issuing the policy.<sup>191</sup> In this scenario, the policy would not be subject to voidance.<sup>192</sup> If, however, the policyholder answered all of the questions, but omitted the terminal illness in an answer with which the illness should have been reported, then the insurer can assert the concealment defense.<sup>193</sup> Thus, a reasonable insurer would be misled if the policyholder omitted information that was asked about on an otherwise seemingly complete application and could therefore assert this defense during the contestable period.<sup>194</sup>

Additionally, the insurer could assert the misrepresentation defense if the policyholder represented false information on the policy by affirming or denying statements. Therefore, if the insurance application specifically asked a question that would require the policyholder to disclose the existence of a terminal illness, and the policyholder lied about the insured hav-

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187. *What Do Insurers Look for in a Life Insurance Blood Test and Medical Exam?*, *supra* note 164.

188. *See generally id.*

189. *Id.*

190. *See DOBBYN & FRENCH, supra* note 78, at 315.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

ing the illness, the insurer could void the policy within the contestable period.

Based on the defenses of concealment and misrepresentation, a suicide clause in this scenario is likely irrelevant. Because an insured participating in PAS would logically die within the contestable period, based on the definition of “terminal disease,”<sup>195</sup> the insurer would likely be able to void the insurance policy solely on concealment or misrepresentation defenses without making an argument based on the suicide clause. A suicide clause would only be relevant if the court held that a reasonable insurer would not have been misled by a policyholder’s omission or misrepresentation of facts, as discussed in Section II.B.2.d. of this paper.

*C. Scenario 3: The Policyholder Did Not Know About the Terminal Illness Prior to Applying for Life Insurance, and thus, Could Not Disclose the Information to the Insurer.*

As with the last two scenarios, prior to the issuance of the life insurance policy, a policyholder in this situation likely completed an application for insurance and possibly submitted to an IME. In this scenario, however, the policyholder was not able to inform the insurer of the existence of a terminal illness because the policyholder either: (1) was unaware of the existence of the illness; or (2) the insured contracted the disease after the issuance of the policy. In either situation, the insurer should not be able to void the policy after the insured participates in PAS.

Unlike Scenario 2, the insured cannot successfully assert the concealment or misrepresentation defenses in this scenario because the policyholder could not possibly conceal or misrepresent a fact of which the policyholder was unaware at the time of completing the application. Because the policyholder has no duty to inform the insurer of the development of a terminal disease after the insurance policy was issued,<sup>196</sup> the insurer could not assert the defenses of concealment or misrepresentation unless the policyholder was aware of the disease *prior* to the issuance of the policy.<sup>197</sup> Therefore, because the policyholder has no duty to inform the insurer of a new disease *after* the issuance of the policy, the insurer has no basis to contest the validity of the insurance policy within the contestable period.

195. A person is considered “terminally ill” under PAS statutes if the person is diagnosed with six months or less to live. *See* OR. REV. STAT. § 127.800 (2020) (defining “terminal disease”).

196. DOBBYN & FRENCH, *supra* note 78, at 315.

197. *Id.* at 315–16 (“[I]n the case of life insurance, where there is frequently an appreciable period of time between the submission of the completed application and the issuance of the policy of insurance, the duty on the part of the insured to disclose new material information continues until the insurer becomes bound by the contract. During the interim period of time, the insured also has a duty to *correct* answers on the application that become untrue.”) (emphasis in original).

As in Scenario 1, an insurer that includes a suicide clause within the insurance policy may assert that the contract is void on the ground that the insured committed suicide within the contestable period. Thus, courts facing the issue of whether to apply a suicide clause in the case of PAS should rule that the suicide clause is inapplicable based on public policy surrounding the purpose of PAS—for terminally-ill individuals to choose their manner of death in a dignified, controlled manner.<sup>198</sup>

As discussed in Scenario 1, PAS is an atypical suicide because it is expressly legal in jurisdictions that have enacted right-to-die laws,<sup>199</sup> and right-to-die jurisdictions require the person participating in PAS to be terminally ill.<sup>200</sup> Thus, because an insured eligible to participate in PAS has only a set time period to live, beneficiaries of the insured's life insurance policy should receive the benefits of the policy, regardless of contractual language to the contrary (e.g., suicide clauses). A ruling to the contrary would allow insurers to discriminate against terminally-ill individuals, thereby frustrating the purposes of right-to-die laws—allowing terminally-ill patients to choose a dignified, controlled death instead of suffering through a gruesome terminal disease.<sup>201</sup> Further, because those eligible to participate in PAS will perish within six months, expediting the insured's death should not affect whether an insurer owes the policy beneficiaries payment; the insurer will nonetheless owe the policy benefits within six months, regardless of whether the insured decides to participate in PAS. Thus, because PAS is distinguishable from a “typical” suicide, and based on the legislative intent of right-to-die laws, suicide clauses should not apply to an insured who participates in PAS, regardless of policy language to the contrary.

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198. *Death with Dignity Acts*, *supra* note 13.

199. These jurisdictions include California, Colorado, Washington, D.C., Hawaii, Maine, New Jersey, Oregon, Vermont, and Washington. *See Take Action in Your State*, *supra* note 3.

200. CAL. HEALTH & SAFETY CODE § 443.2 (2020); COLO. REV. STAT. § 25-48-103 (2020); D.C. CODE § 7-661.03 (2020); HAW. REV. STAT. § 327L-2 (2019); ME. REV. STAT. 22 § 2140 (2019); N.J. STAT. § 26:16-2 (2019); OR. REV. STAT. § 127.805 (2020); VT. STAT. ANN. tit. 18, § 5283 (2020); WASH. REV. CODE § 70.245.020 (2020).

201. *Death with Dignity Acts*, *supra* note 13 (“[T]he basic idea . . . [is that] the terminally ill people . . . should make their end-of-life decisions and determine how much pain and suffering they should endure . . . [b]y adding a voluntary option to the continuum of end-of-life care, these laws give patients dignity, control, and peace of mind during their final days with family and loved ones.”).

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A RIGHT TO DIE

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IV. STATES RATIFYING PHYSICIAN-ASSISTED SUICIDE LAWS SHOULD  
ADOPT LANGUAGE THAT EXPRESSLY REQUIRES INSURANCE COMPANIES TO  
HONOR LIFE INSURANCE POLICIES WHEN AN INSURED PARTICIPATES  
IN PHYSICIAN-ASSISTED SUICIDE.

Thus far, each of the nine jurisdictions that have statutorily adopted PAS laws include a section regarding the application of insurance and annuities when an insured participates in PAS.<sup>202</sup> For example, the Oregon Death with Dignity Act explicitly states:

The sale, procurement, or issuance of any life, health, or accident insurance or annuity policy or the rate charged for any policy shall not be conditioned upon or affected by the making or rescinding of a request, by a person, for medication to end his or her life in a humane and dignified manner. Neither shall a qualified patient's act of ingesting medication to end his or her life in a humane and dignified manner have an effect upon life, health, or accident insurance or annuity policy.<sup>203</sup>

Because Oregon's Death with Dignity statute is the model statute regarding PAS laws,<sup>204</sup> other jurisdictions that have adopted PAS legislation follow Oregon's language almost verbatim.<sup>205</sup> Aside from Vermont,<sup>206</sup> those jurisdictions that differ from Oregon's legislation differ only slightly in statutory language,<sup>207</sup> but all nine of the jurisdictions require insurers to honor an insured's choice to participate in PAS.<sup>208</sup>

In 2019, eighteen states considered right-to-die legislation,<sup>209</sup> and two states adopted right-to-die laws.<sup>210</sup> Thus far in 2020, sixteen states are considering right-to-die legislation.<sup>211</sup> Language requiring insurers to honor an insured's choice to participate in PAS is imperative as more states adopt

202. CAL. HEALTH & SAFETY CODE § 443.2 (2020); COLO. REV. STAT. § 25-48-103 (2020); D.C. CODE § 7-661.03 (2020); HAW. REV. STAT. § 327L-2 (2019); ME. REV. STAT. 22 § 2140(19) (2019); N.J. STAT. § 26:16-2 (2019); OR. REV. STAT. § 127.805 (2020); VT. STAT. ANN. tit. 18, § 5283 (2020); WASH. REV. CODE § 70.245.020 (2020).

203. OR. REV. STAT. § 127.875 (2020).

204. *Death with Dignity Acts*, *supra* note 13.

205. HAW. REV. STAT. § 327L-17 (2019); WASH. REV. CODE § 70.245.170 (2019).

206. Vermont's statutory language regarding the effect of PAS on insurance policies is unique. Specifically, Vermont's Patient Choice at End of Life Act focuses, in part, on a physician's willingness to assist a patient with PAS and the effect of that decision on medical malpractice insurance. VT. STAT. ANN. tit. 18, § 5287(b) (2020).

207. CAL. HEALTH & SAFETY CODE § 443.13(a)(1) (2020); COLO. REV. STAT. § 25-48-115 (2020); D.C. CODE § 7-661.009 (2020); ME. REV. STAT. 22 § 2140 (2019); N.J. STAT. § 26:16-14(c) (2019).

208. CAL. HEALTH & SAFETY CODE § 443.13 (2020); COLO. REV. STAT. § 25-48-115 (2020); D.C. CODE § 7-661.009 (2020); HAW. REV. STAT. § 327L-17 (2019); ME. REV. STAT. 22 § 2140(19) (2019); N.J. STAT. § 26:16-14 (2019); OR. REV. STAT. § 127.875 (2020); VT. STAT. ANN. tit. 18, § 5287 (2020); WASH. REV. CODE § 70.245.170 (2020).

209. *Take Action in Your State*, *supra* note 3.

210. Maine and New Jersey adopted PAS legislation during the 2019 legislative session. *See From First Bill to Final Win*, *supra* note 18.

211. *Take Action in Your State*, *supra* note 3.

PAS statutes. Aside from the unpredictability, time, and costs associated with litigation,<sup>212</sup> failure to adopt language explicitly requiring insurance companies to honor the policyholder's insurance contract, regardless of the insured's participation in PAS, carries significant public policy implications. For example, a simple suicide clause within the policy could void the policy completely if the insurer decides to contest validity of the contract within the contestable period.<sup>213</sup> This possible implication is especially troubling in Montana, which is the only state that has adopted PAS through the state's common law.<sup>214</sup>

A. *Montana's Failure to Codify Physician-Assisted Suicide Legislation Leaves Consumers Participating in PAS Vulnerable to the Will of Insurers.*

The possibility for insurers to contest validity of the insurance contract under a suicide clause is especially likely in Montana where PAS has not been codified.<sup>215</sup> In 2009, the Montana Supreme Court held in *Baxter v. State*<sup>216</sup> that nothing in Montana law prohibits suicide, and thus, physicians who assist terminally-ill patients in hastening their deaths cannot be prosecuted under the state's deliberate homicide statute.<sup>217</sup> Although several bills have been introduced in the Montana legislature since the holding in *Baxter*,<sup>218</sup> none of these bills have passed.<sup>219</sup> The court in *Baxter*, however, held that "physician aid in dying provided to terminally ill, mentally competent adult patients" is not contrary to public policy.<sup>220</sup> In its rationale, the court explained that a physician aiding a patient in dying "is not directly

212. Charles Orton-Jones, *Is litigation worth the expense and emotional cost?* RACONTEUR (May 25, 2016), <https://perma.cc/D3Y6-52XH> ("Litigation can be unpredictable, the financial cost is uncertain and . . . complicated issues [can be] timely and costly to explore.")

213. See *supra* Part III.C. for a detailed discussion of this possibility.

214. See *Death with Dignity Acts*, *supra* note 13.

215. Several bills have been initiated in the Montana legislature, none of which have passed. See *id.*

216. *Baxter v. State*, 224 P.3d 1211 (Mont. 2009).

217. *Id.* at 1215 (holding that the consent as a defense, codified at MONT. CODE ANN. § 45-2-211, protects physicians from a deliberate homicide charge if the physician, with consent from the patient, assists a patient in hastening the patient's death). Deliberate homicide is codified at MONT. CODE ANN. § 45-5-102 (2019).

218. Senate Bill 202 would have modeled Oregon's Death with Dignity Act, outlining requirements for individuals to participate in PAS. S.B. 202, 64th Mont. Leg., Reg. Sess. (Mont. 2015). Montana legislators considered two other Senate bills in 2011 and 2013 that would have legalized PAS. See S.B. 167, 63rd Mont. Leg., Reg. Sess. (Mont. 2011); S.B. 220, 64th Mont. Leg., Reg. Sess. (Mont. 2013). House Bill 536 and House Bill 284 would have created a law explicitly criminalizing physician aid in dying. H.B. 536, 65th Mont. Leg., Reg. Sess. (Mont. 2017); H.B. 284, 66th Mont. Leg., Reg. Sess. (Mont. 2019). Because these bills did not pass through the legislature, *Baxter v. State* is currently the controlling law in Montana. See *Death with Dignity Acts*, *supra* note 13.

219. *Id.*

220. *Baxter*, 224 P.3d at 1215.

involved in the final decision *or* the final act.”<sup>221</sup> To support its conclusion, the court cited the Montana Rights of the Terminally Ill Act,<sup>222</sup> which entitles patients to make “autonomous, end-of-life decisions.”<sup>223</sup>

The Montana Rights of the Terminally Ill Act contains a section regarding the effect of insurance when the patient makes the decision to withdraw or withhold medical treatment.<sup>224</sup> This section reads:

The making of a declaration pursuant to [Section] 50-9-103 does not affect the sale, procurement, or issuance of any policy of life insurance or annuity, nor does it affect, impair, or modify the terms of an existing policy of life insurance. A policy of life insurance is not legally impaired or invalidated by the withholding or withdrawal of life-sustaining treatment from an insured, notwithstanding any term of the policy to the contrary.<sup>225</sup>

The Montana Rights of the Terminally Ill Act does not apply to PAS because the Act omits PAS in its language.<sup>226</sup> Specifically, Section 50-9-205(1) of the Act applies to “death resulting from the withholding or withdrawal of life-sustaining treatment,”<sup>227</sup> which is not within the definition of PAS.<sup>228</sup>

The statutory language of the Montana Rights of the Terminally Ill Act becomes critical if any of the scenarios noted above were to occur. As the law in Montana currently stands, PAS lacks any regulation. Among other public policy concerns, because Montana has not codified regulations for PAS,<sup>229</sup> and because PAS does not fit into the language of the Montana Rights of the Terminally Ill Act,<sup>230</sup> an insurer may deny an insured coverage under a life insurance policy should a physician help hasten the insured’s imminent death. Unless the policyholder can assert a defense of waiver or estoppel, the beneficiaries of the policy will likely be stripped of the policy’s benefits.<sup>231</sup>

Failing to pay benefits on policies in which insureds chose to hasten their own impending deaths is fundamentally inequitable. The purpose of PAS is to afford terminally-ill individuals the dignity, autonomy, and independence to choose their manner of death without the pain and suffering of

221. *Id.* at 1217 (emphasis in original).

222. MONT. CODE ANN. §§ 50-9-101 to 50-9-111 (2019).

223. *Baxter*, 224 P.3d at 1217.

224. MONT. CODE ANN. § 50-9-205 (2019).

225. MONT. CODE ANN. § 50-9-205(2) (2019).

226. *Baxter*, 224 P.3d at 1219.

227. MONT. CODE ANN. § 50-9-205(a) (2019).

228. When electing PAS, “the doctor assists suicide by offering her medical knowledge, but does not actively or passively participate in the actual event of death.” Chamberlain, *supra* note 7, at 65.

229. *Death with Dignity Acts*, *supra* note 13.

230. MONT. CODE ANN. § 50-9-205(1) (2019).

231. As noted above, should the insurer contest validity of the insurance policy under a suicide clause in a state that has not codified a PAS statute, and the policyholder’s estate cannot defend on waiver or estoppel grounds, then the insurer will likely succeed in voiding the contract.

waiting on the disease to consume them.<sup>232</sup> Insureds should not have to worry about whether their beneficiaries will be adequately compensated if the insured chooses to participate in PAS. The insured's main concerns should be on their palliative care, which is the purpose behind PAS,<sup>233</sup> not whether the insurance companies will contest validity of an insurance contract.

*B. If the United States Supreme Court Rules that PAS is a Fundamental Right, States Should Enact PAS Laws that Require Insurers to Honor an Insured's Choice to Participate in Physician-Assisted Suicide in Order to Protect Consumers.*

Codifying PAS and including explicit statutory provisions requiring insurers to honor an insured's choice to participate in PAS will become even more imperative if the United States Supreme Court rules that the right to die is fundamental, thus legalizing PAS throughout the states.<sup>234</sup> Although the Court has been faced with the question of whether individuals have a right to PAS on several occasions, it has refused to recognize such right and has even gone so far as to explicitly reject its existence.<sup>235</sup> Further, the Court has not heard a case regarding the right to die since 2006 in *Gonzales*.<sup>236</sup> Although recent debate in California could have led to an appeal to the Court, litigants involved in the constitutional challenges of California's End of Life Options Act<sup>237</sup> chose not to appeal the California Supreme Court's decision in *Ahn v. Becerra*.<sup>238</sup>

232. See generally *Death with Dignity Acts*, *supra* note 13.

233. *Id.*

234. Indeed, codifying PAS laws as quickly as possible after any common law ruling is essential to protect beneficiaries' rights. As Justice James C. Nelson noted in his concurrence in *Baxter v. State*, states may find a fundamental right to bodily autonomy and individual privacy within their state constitutions. *Baxter v. State*, 224 P.3d 1211, 1233 (Nelson, J., concurring) (stating that "physician aid in dying is firmly protected by Article II, Sections 4 and 10 of the Montana Constitution"). Thus, had the Montana Supreme Court rooted its holding in the State Constitution, as suggested by Justice Nelson, legislative attempts to thwart *Baxter* would be impossible without a constitutional amendment. The same logic can be applied to any state or federal common law decision that determines PAS is a fundamental right under an applicable constitution.

235. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 274–75 (2006) (holding that, although not creating a fundamental right to die, the United States Attorney General could not prohibit physicians from prescribing drugs to assist in PAS under the federal Controlled Substance Act); *Vacco v. Quill*, 521 U.S. 793 (1997) (ruling that New York statutes do not violate Equal Protection of terminally ill patients); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that the asserted right to assist in another person's suicide is not fundamental).

236. 546 U.S. 243 (2006).

237. CAL. HEALTH & SAFETY CODE §§ 443–443.22 (2020).

238. See *Ahn v. Becerra*, Docket No. S253709 (Cal. Jan. 23, 2019).

In rather dramatic fashion, litigants have challenged California's End of Life Options Act<sup>239</sup> in the courts since the Act went into effect in 2016.<sup>240</sup> In *Ahn*, the trial court ruled that the Act was unconstitutional, thereby striking down the opportunity for terminally-ill patients to seek out PAS in California.<sup>241</sup> A California appellate court, however, reversed this ruling through a writ of mandamus based on lack of standing.<sup>242</sup> On February 27, 2019, the California Supreme Court denied review of four issues raised by plaintiffs.<sup>243</sup>

Since the ruling in *Ahn*, two more states have adopted PAS laws.<sup>244</sup> New Jersey adopted its Medical Aid in Dying for the Terminally Ill Act on April 12, 2019, and the law went into effect on August 1, 2019.<sup>245</sup> On June 6, 2019, Republican Assembly member, Robert Auth, along with three co-sponsors, introduced a bill in an attempt to repeal the new law before it went into effect.<sup>246</sup> As of April 4, 2020, H.B. 5525 has been referred to the Assembly Judiciary Committee but has not yet been passed.<sup>247</sup>

Additionally, Maine adopted its Death with Dignity Act on June 12, 2019.<sup>248</sup> On June 26, 2019, the Christian Civic League of Maine filed a petition to repeal the Death with Dignity Act, pursuant to a veto ballot initiative.<sup>249</sup> The Christian Civic League of Maine failed to procure the required amount of signatures to put the veto initiative on Maine's election ballot.<sup>250</sup>

The challenges to the newly enacted laws in Maine and New Jersey are not surprising. Indeed, aside from Hawaii and Washington, each time a state has adopted PAS laws, those in opposition have challenged the laws through legislative initiative or through litigation.<sup>251</sup> Thus, as more states adopt right-to-die laws, it is extremely likely that the United States Supreme Court will grant certiorari in lawsuits challenging the new laws. Should the

239. CAL. HEALTH & SAFETY CODE §§ 443–443.22 (2020)

240. See *California*, *supra* note 35.

241. Answer to Petition for Review, *Ahn v. Becerra*, No. S253709 (Cal. Feb. 13, 2019) at 5.

242. *Id.*

243. *Ahn v. Becerra*, No. S253709, 2019 CA Lexis 1296 (Cal. Feb. 27, 2019).

244. Maine and New Jersey passed PAS legislation during the 2019 legislative session. See *From First Bill to Final Win*, *supra* note 18. New Jersey's Medical Aid in Dying for the Terminally Ill Act is codified at N.J. STAT. §§ 26:16-1 to 26:16-20 (2019). Maine's Death with Dignity Act is codified at ME. REV. STAT. 22 § 2140(2)(M) (2019).

245. *New Jersey*, *supra* note 35.

246. H.B. 5525, 218th N.J. Leg., 2d. Sess. (N.J. 2019).

247. Repeals "Medical Aid in Dying for the Terminally Ill Act", NEW JERSEY OFFICE OF LEGIS. SERVS., <https://perma.cc/5XR4-CU3F> (last visited July 1, 2020).

248. 2019 Me. Legis. Serv. Ch. 271 (H.P. 948) (L.D.M 1313) (West).

249. *Maine*, *supra* note 59.

250. *Id.*

251. *California*, *supra* note 35; *Colorado*, DEATH WITH DIGNITY, <https://perma.cc/GQB8-FJYM> (last visited January 31, 2020); *District of Columbia*, DEATH WITH DIGNITY, <https://perma.cc/2M84-4KHJ> (last visited July 28, 2020); *Maine*, *supra* note 59; *New Jersey*, *supra* note 35; *Oregon*, *supra* note 15; *Vermont*, *supra* note 35.

United States Supreme Court ever overturn *Glucksberg* and rule that the right to die is a fundamental, it is crucial that states explicitly adopt PAS laws that include provisions explicitly and unambiguously requiring insurers to honor an insured's decision to participate in PAS, regardless of contractual provisions to the contrary.

To date, Maine has adopted the most comprehensive insurance provisions to protect consumers.<sup>252</sup> Subsection 19 of Maine's Death with Dignity Act, regarding insurance annuity policies, reads:

The sale, procurement or issuance of any life, health or accident insurance or annuity policy or the rate charged for any life, health or accident insurance or annuity policy may not be conditioned upon or affected by the making or rescinding of a request by a qualified patient for medication that the patient may self-administer to end the patient's life in accordance with this Act. A qualified patient whose life is insured under a life insurance policy issued under the provisions of Title 24–A, chapter 29 *and the beneficiaries of the policy may not be denied benefits on the basis of self-administration of medication by the qualified patient in accordance with this Act.* The rating, sale, procurement or issuance of any medical professional liability insurance policy delivered or issued for delivery in this State must be in accordance with the provisions of Title 24–A.<sup>253</sup>

Incorporating the clear, unambiguous language regarding insurance and annuity policies in Maine's Death with Dignity Act is imperative for states adopting future PAS laws. Failure to adopt these provisions could lead to the prejudicial and inequitable withholding of rightful benefits by insurance companies in states that have explicitly legalized PAS. Further, should the Supreme Court find that the right to die is fundamental, thereby legalizing PAS throughout the country, adoption of these insurance provisions is even more imperative. Failure to adopt explicit, unambiguous language in PAS laws, such as the language in Maine's Death with Dignity Act, could lead to a nationwide withholding of benefits to beneficiaries of insureds who choose to participate in PAS,<sup>254</sup> similar to the pitfall in Montana's failure to adopt a statute regulating PAS.

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252. ME. REV. STAT. 22 § 2140(19) (2019).

253. ME. REV. STAT. ANN. 22 § 2140(19) (2019).

254. This potential nationwide withholding of benefits would not apply to jurisdictions that have codified PAS because their statutes explicitly require insurers honor an insured's decision to participate in PAS. These jurisdictions include California, Colorado, District of Columbia, Hawaii, Maine, New Jersey, Oregon, Vermont, and Washington. *See Take Action in Your State, supra* note 3.

V. RECOMMENDATION TO AMEND EXISTING STATUTES THAT ADDRESS  
THE RELATIONSHIP BETWEEN PHYSICIAN-ASSISTED SUICIDE  
AND INSURANCE

Although nine jurisdictions have currently codified PAS laws, only Maine explicitly addresses whether the terms of a life insurance policy are voided when they conflict with the PAS statute's language.<sup>255</sup> The statutes at issue simply state that “[a] qualified patient’s act of ingesting medication to end his or her life . . . [shall not] have an effect upon life . . . insurance.”<sup>256</sup> This broad-sweeping language begs the question—what constitutes an “effect” upon life insurance? As such, existing PAS statutes should be amended to tighten the requirement that insurers honor policyholder’s insurance policies in the event the insured participates in PAS, regardless of the terms of the contract. In particular, legislatures in jurisdictions with existing PAS laws, and those jurisdictions adopting these laws in the future, should include the language from Maine’s Death with Dignity Act.<sup>257</sup> Specifically, states with existing PAS laws and states adopting PAS laws in the future should include the following provision:

A qualified patient whose life is insured under a life insurance policy issued under the provisions of [title of the Act being adopted] and the beneficiaries of the policy may not be denied benefits on the basis of self-administration of medication by the qualified patient in accordance with this Act.<sup>258</sup>

By adopting this language, jurisdictions with PAS laws would further protect individuals from unfair and discriminatory treatment by their insurers by requiring the insurers to pay rightful benefits to named beneficiaries under life insurance policies of insureds who participate in PAS, regardless of policy language to the contrary.

VI. CONCLUSION

An individual’s right to privacy and bodily autonomy has been expanding for the past half-century of American jurisprudence.<sup>259</sup> Although

255. As discussed in Part IV.B. *supra*, Maine is the only state that has adopted statutory language that explicitly and unambiguously requires insurers to provide benefits to beneficiaries of insurance policies in which the insured participates in PAS.

256. OR. REV. STAT. § 127.875 (2020).

257. ME. REV. STAT. 22 § 2140(19) (2019).

258. ME. REV. STAT. 22 § 2140(19) (2019).

259. *See, e.g.*, Obergefell v. Hodges, 135 S.Ct. 2584, 2607–08 (2015) (holding that individuals of the same sex have a constitution right to marry one another); Roe v. Wade, 410 U.S. 113, 165 (1973) (ruling women have a constitutional right to abortion); Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (holding that the Equal Protection Clause of the Fourteenth Amendment extends the right to contraception to non-married individuals); Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (holding that individuals have a constitutional right to marry each other, regardless of race); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (striking down a Connecticut statute banning the sale of contraceptives).

the Supreme Court has yet to rule that an individual has a fundamental right to PAS, jurisdictions have been adopting PAS laws since Oregon codified its Death with Dignity Act in 1997.<sup>260</sup> Each of these jurisdictions' laws include specific language requiring insurers to honor insurance policies on an insured if the insured chooses to participate in PAS.<sup>261</sup> Aside from Maine, these statutes fail to address whether the terms of the policy, specifically exclusions and suicide clauses, are negated when the insured participates in PAS. Because of the potential pitfalls in the broad language of existing PAS statutes, legislatures in jurisdictions with these existing laws should amend their laws to include explicit language indicating that a policy involving an insured who was unaware of the terminal disease at the time of purchasing life insurance and who participates in PAS is not effected by the insured's participation in PAS, regardless of any policy provisions to the contrary. This paper suggests that existing and future PAS laws should adopt the language from Maine's PAS laws regarding insurance and annuities policies.

Further, states that have failed to adopt PAS laws leave their constituents in a vulnerable position if they choose to participate in PAS. Because no regulations exist regarding PAS, and thus no regulations exist regarding insurance in the context of PAS, constituents in these jurisdictions may fall prey to avoidance of life insurance policies by the insurer. Three situations can be outlined in the case of an insured participating in PAS in a state that does not regulate the practice: (1) the policyholder knew of the terminal illness before applying for life insurance and disclosed this information to the insurer; (2) the policyholder knew of the terminal illness before applying for life insurance and failed to disclose this information to the insurer; and (3) the policyholder did not know about the terminal illness prior to applying for life insurance, and thus, could not disclose the information to the insurer.

To protect policyholders in these scenarios, courts must examine these issues from the perspective of the insurers and policyholders. In particular, courts must analyze a myriad of defenses and counter-defenses, including concealment, misrepresentation, waiver, and estoppel, and apply these defenses to the particular facts of the case to determine whether the insurance policy should apply as written. This process is costly, unpredictable, and

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260. See *Death with Dignity Acts*, *supra* note 13. See also OR. REV. STAT. §§ 127.800 *et seq.* (2020). Since the passage of Oregon's Death with Dignity Act, eight other jurisdictions have adopted PAS laws. *Death with Dignity Acts*, *supra* note 13; these jurisdictions are California, Colorado, District of Columbia, Hawaii, Maine, New Jersey, Vermont, and Washington.

261. CAL. HEALTH & SAFETY CODE § 443.13 (2020); COLO. REV. STAT. § 25-48-115 (2020); D.C. CODE § 7-661.009 (2020); HAW. REV. STAT. § 327L-17 (2019); ME. REV. STAT. 22 § 2140(19) (2019); N.J. STAT. § 26:16-14 (2019); OR. REV. STAT. § 127.875 (2020); VT. STAT. ANN. tit. 18, § 5287 (2020); WASH. REV. CODE § 70.245.170 (2020).

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time-consuming.<sup>262</sup> For this reason, to protect their constituents from prejudicial treatment, it is imperative that states adopting PAS laws include statutory language that explicitly requires insurers to honor insurance policies in which an insured participates in PAS, regardless of the individual policy provisions.

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262. Orton-Jones, *supra* note 213.

